

**Tribal Law and Counties: Is it time for more Autonomy?**

**Should Tribal Law Enforcement Be Granted the Authority to Police their own lands?**

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The Command College Futures Study Project is a FUTURES study of a particular emerging issue of relevance to law enforcement. Its purpose is NOT to predict the future; rather, to project a variety of possible scenarios useful for strategic planning in anticipation of the emerging landscape facing policing organizations.

This journal article was created using the futures forecasting process of Command College and its outcomes. Defining the future differs from analyzing the past, because it has not yet happened. In this article, methodologies have been used to discern useful alternatives to enhance the success of planners and leaders in their response to a range of possible future environments.

Managing the future means influencing it—creating, constraining and adapting to emerging trends and events in a way that optimizes the opportunities and minimizes the threats of relevance to the profession.

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*Should Tribal law Enforcement Be Granted the Authority to police their own lands?*

Imagine being stopped by a Tribal law enforcement officer on tribal lands located within the State of California and given a citation for a State violation. Like any other citation, it would be received, processed, and recorded in state court just like any other citation written by a municipal or county agency. All matters, incidents, and criminal investigations would now be the responsibility of the Tribal law enforcement agency located on Tribal lands. Although the present looks far different, the future may look just like this.

*Whose police is it?*

The controversy between California Sheriff's and Tribal law enforcement agencies over criminal jurisdiction on tribal lands (Rancherias, reservations, and trust allotments) is not a new problem. In 1953, the 83<sup>rd</sup> Congress enacted Public Law 83-280, 18 U.S.C., Sect. 1162, 28 U.S.C., Sect. 1360), which gave the State of California criminal and some civil jurisdiction over tribal lands within the State. There were six states affected by this law (those with tribal lands); California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. Pursuant to this law, criminal matters (and some civil issues) on tribal lands were transferred to the States.

The tribes residing in these lands had no voice in the matter, were not consulted, and did not consent to this new law. States also expressed frustration because the law increased their authority and their workload without providing any funding to fulfill the mandates it established (Public Law 280: Issues and Concerns for Victims of Crime in Indian Country, Ada Pecos and Jerry Gardner). Prior to 1953, the Federal Government (Department of Interior, Bureau of Indian Affairs) and tribes shared jurisdiction on tribal lands. Since that time, the burden has largely fallen on county Sheriff's offices, whose position is that they are mandated to enforce State laws

(Public Law 280: Issues and Concerns for Victims of Crime in Indian Country, Ada Pecos and Jerry Gardner). Interestingly, the various tribal law enforcement agencies disagree. Their position is they are still allowed to enforce their respective tribal law and order codes (Indian Country Today, July 09, 2010). In spite of the varied laws and court decisions, strong feelings and personal bias influence the ongoing debate regarding the Sheriffs primacy of enforcement of California laws on tribal lands.

It is difficult to isolate individual causes of why counties continue to assert responsibility for the enforcement of state laws on tribal lands. Political and economic disagreements between the State of California and Tribes in prior years over jurisdiction and sovereignty exacerbate the issue. In fact, the disagreement between the Sheriffs and the Tribal law enforcement agencies over inadequate law enforcement services was a more significant cause of the transfer of jurisdiction from the federal government and the tribes to the State which took place in 1953 under Public Law 83-280 than were opposing views of mistrust. In spite of these realities, the time may actually be right to consider transferring full law enforcement authority back to tribes on their land.

#### *Future Considerations*

The State of California has a 28 billion dollar deficit, which impacts all 58 counties in the State. This may result in local Sheriffs not being able to adequately meet the terms and conditions placed on them by the enactment of PL 83-280. The economic pressures will not ease in the foreseeable future, which leads to the thought that now may be time for retrocession; to return the jurisdiction for tribal lands to their police (Public Law 280: Issues and Concerns for Victims of Crime in Indian Country, Ada Pecos and Jerry Gardner).

The primary reason for retrocession would be the elimination of the unfunded Federal mandate created in 1953. Tribes now have their own police departments, and could be a part of the State's mutual aid agreement. In that role, they could provide resources for disasters or other major events in their respective regions. Tribal Police could participate as member agencies in the California Peace Officers Standards Training (POST) program and adhere to State Department of Justice guidelines for all law enforcement agencies. This would ensure those who live or visit tribal lands would have the same police protection they receive elsewhere in the State. The funding of tribal law enforcement from their own revenue sources would also alleviate pressure on many struggling counties. Foremost, it would provide consistent police practice in each jurisdiction in the State.

#### *Concurrent Law Enforcement Jurisdiction*

How, then, could we accommodate a transfer of jurisdiction from counties to the tribes? As noted, many tribes have already created their own law enforcement/public safety agencies to enforce their Tribal Law and Order Code (criminal laws). Each tribe has their own independent constitutions, recorded with the Department of Interior, Bureau of Indian Affairs (BIA). According to the most recent survey (May 13, 2009) by the California State Sheriff's Association, Amador, Butte, Del Norte, Fresno, Humboldt, Kings, San Bernardino, and Imperial have their own law enforcement or public safety agencies. So, eight out of the one hundred tribes located in California have their own law enforcement/public safety agencies. None of these tribal public safety agencies, though, can enforce California state law. Some of these constitutions have an Article that allows them to create and enforce a tribal law and order code. In addition, some, tribal law enforcement agencies are certified by the Department of Interior, Bureau of Indian Affairs as a Special Law Enforcement Commission (SLEC) which provides

them with the authority to enforce violations of federal criminal statutes. They have to meet specific requirements and trainings of BIA, before they can be certified.

The State of California on the other hand, consists of law enforcement agencies from the state, counties, and cities. Since most of the tribal lands are located in rural parts of the State of California, they become the jurisdiction of the respective County Sheriff's. Depending on the situation, the county sheriff's office or the local tribal law enforcement agency may or may not take enforcement action on criminal matters. This illustrates the importance of determining who has the legal authority and responsibility to enforce criminal Laws on tribal lands. Fortunately, the willingness of tribes is already evident by their interaction with State and Federal agencies to expand their abilities to provide a larger range of policing services.

### *Law of the Land*

The courts have ruled that PL 83-280 does not abolish jurisdiction over criminal issues for State agencies, and tribal and state-county governments share concurrent jurisdiction. The tribes routinely enforce their Tribal Law and Order Code on tribal lands, whereas the sheriff enforces the California state statutes. In addition, some tribal law enforcement agencies have been designated by the Department of Interior, BIA, as Special Law Enforcement Commissions to enforce federal criminal statutes on Non-Native Americans or Native Americans while on tribal lands. Also, on a local level, some of the tribes have entered into Memorandums of Understanding (MOU) or Agreements with various county governments for law enforcement services on tribal lands.

Because of the jurisdictional conflicts, some tribes are now approaching the State to have their tribal law enforcement agencies certified to enforce California state laws on Tribal lands.

The tribes have been dissatisfied with the efficiency and accountability of the sheriff's services. Even as far back as 1953, when Tribes were not consulted or provided with an opportunity to give their consent to Public Law 83-280, they have felt the process was one sided, and that it failed to recognize tribal sovereignty (Indian Country Today, 2010). An example of their effort to gain support from the State can be illustrated by their recent request to gain access to the California Law Enforcement Telecommunications System (CLETS) because of their Special Law Enforcement Commission (SLEC) status (California State Sheriff's Association 2010). Access was denied by the California Attorney General under the authority of California, Government Code, and Section 15153, which allows access only to the State of California, cities, counties and public agencies, and not tribal law enforcement agencies (California State Sheriff's Association, 2010). Tribal law enforcement agencies are not under the authority of the State of California and therefore are not a public agency. Despite this setback, they continue to seek the authorization of the State to enforce California law on tribal lands (Capital Weekly, Malcolm Maclachlan). One reason for their persistence may be the rise in crime in their communities.

### *Jurisdiction gaps*

Jurisdictional gaps between the tribal law enforcement agencies and the respective sheriff's offices occur because no government has clear authority or the governments that do have the authority have no institutional support or incentive to exercise that authority, thus creating the equivalent of a legal vacuum.

An effort to close the gaps did not occur until 1968, when an amendment to Public Law 83-280 was introduced. This amendment allowed any state which had previously assumed jurisdiction under Public Law 83-280 to offer the return (retrocession) of all or partial jurisdiction to the federal government by sending a resolution to the Secretary of the Interior,

who would have the discretion to accept or reject the return of jurisdiction. It is important to note, though, the amendment did not contain any mechanism for tribes to initiate a return of jurisdiction on their own, or force this retrocession on an unwilling state. To date, no states have applied to the Secretary of the Interior to return jurisdiction back to the federal government and tribes. Rather than return jurisdiction back to the tribes to enforce California criminal laws on tribal lands, it may be more practical and reasonable for the State to grant the tribal law enforcement agencies the authority to enforce California state law on tribal lands

### *Transferring the Burden*

Even though there have been significant increases in the burden placed on counties in tribal lands (primarily due to the explosion of gambling casinos on tribal land), there has been no means by which counties can recoup their spiraling costs. The lack of funding has created a hardship on the impacted Sheriffs and has made it extremely difficult to continue to provide sufficient personnel, equipment, facilities, and services because of these funding shortages. If Indian tribal law enforcement agencies are authorized to enforce California State laws on tribal lands the effected Sheriffs can substantially reduce their operating cost and avoid an overall hardship presently imposed on them. It would also be consistent with the clear consensus of tribal leaders, and provide better service to those who enter tribal lands. The alternative is a continued economic and logistic burden on county law enforcement agencies, poor or sporadic service on tribal lands, and a continued history of mistrust amongst all parties involved.

### *No funding, No services! (Preferable Scenario)*

It is not hard to imagine a scenario of the future just by extending current trends. In the near term, sheriff's agencies with significant tribal land jurisdiction would have to find ways to balance their budget in the face of continued State deficits creating an extreme hardship on them.

Layoffs would most likely continue to occur, services would be cut, replacement equipment would be deferred, and positions that were unfilled would remain unfilled! The Sheriff's office would struggle to provide the level of service needed to protect the public, and the more imaginative sheriffs might consider requesting that the tribal law enforcement agencies be cross-deputized so tribal lands could be proficiently patrolled. Eventually, social and economic forces will likely induce the State to grant federally recognized tribal law enforcement agencies the certification to enforce state on Tribal lands. Before that happens, we should consider moving ahead of the curve.

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